No. 16038

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES BOYD BROWN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant United States Attorney,
Chief, Criminal Division,

NORMAN W. NEUKOM,
Assistant United States Attorney,
Chief Trial Attorney,

600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

PAGE

I.

Jurisdiction 1

II.

Preliminary statement 1

III.

The statute involved 3

IV.

Questions presented 5

V.

Argument 5

The consecutive sentences imposed were all valid 5

General discussion 9

Brief discussion of cases cited by appellant 12

VI.

Appellant's motion to vacate sentences was premature 14

Conclusion 15

Appendix. Judgment and commitment ..... App. p. 1

TABLE OF AUTHORITIES CITED

Cases	Page
Albrecht v. United States, 273 U. S. 1	11
Bell v. United States, 349 U. S. 81	6
Blockburger v. United States, 284 U. S. 299	5
Brown v. United States, 222 F. 2d 293	2
Burton v. United States, 202 U. S. 344	11
Cosgrove v. United States, 224 F. 2d 146	12
Everett v. United States, 227 F. 2d 457	9
Gore v. United States, 357 U. S. 386	6, 7, 12
Logan v. United States, 253 F. 2d 709	7
Martinez v. United States, 220 F. 2d 740	9
Miller v. United States, 256 F. 2d 501	14
Prince v. United States, 352 U. S. 322	6
Sealfon v. United States, 332 U. S. 575	13
Sherman v. United States, 241 F. 2d 329	8
Simon v. United States, 225 F. 2d 260	13
Toliver v. United States, 249 F. 2d 804	14
United States v. Brisbane, 239 F. 2d 859	9
United States v. Greco, 141 Fed. Supp. 829	14
United States v. Lewis, 227 F. 2d 524, cert. den. 350 U. S. 974	9
United States v. Michener, 331 U. S. 789	11
United States v. Universal C. I. T. Credit Corp., 344 U. S. 218	6
United States v. Young, 93 Fed. Supp. 76	14
Williams v. United States, 236 F. 2d 894	14
Yancy v. United States, 252 F. 2d 554	7
Yawn v. United States, 244 F. 2d 235	13

RULES PAGE

Federal Rules of Criminal Procedure, Rule 37 1

Federal Rules of Criminal Procedure, Rule 39 7

STATUTES

Boggs Act of 1951 (65 Stat. 767) 9, 10

Narcotic Drugs Import and Export Act, Sec. 2(c) 9

United States Code, Title 28, Sec. 1291 1

United States Code, Title 28, Sec. 2255 ..... 1, 14

United States Code Annotated, Title 21, Sec. 174 .....
..... 2, 3, 5, 6, 8, 9

No. 16038

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES BOYD BROWN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

I.
JURISDICTION.

The jurisdiction of this Court is probably invoked by reason of Section 2255 of Title 28, U. S. C., which provides for an appeal to this Court from the order denying the motion made in the District Court, and likewise, by reason of Rules 37 and 39 of the Federal Rules of Criminal Procedure, also as provided for in Section 1291 of Title 28, U. S. C. A. The appellee will later discuss what appears to be an absence of jurisdiction.

II.
PRELIMINARY STATEMENT.

The sentence on the retrial of appellant was had on April 19, 1954. The sentence was for a total of 40 years, 10 years on each of four counts, to run consecutively.

An appeal from such sentence was made to this Court and the conviction was affirmed on its merits (*Brown v. United States,* 222 F. 2d 293). There is no Clerk's Transcript; however, it is understood the entire file will be available to this Court for its further determinations.

In the month of February, 1958, appellant presented to the trial Court, namely, William C. Mathes, a document entitled "Motion for Correction of Sentence Memorandum." Judge William C. Mathes made his order of February 13, 1958, which reads as follows:

"ORDER.

"Inasmuch as the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief [28 U. S. C. Sec. 2255] the motion is hereby denied.

February 13, 1958

Wm. C. Mathes
United States District Judge."

The appellant applied for review to this Court and on June 23, 1958, this Court entered its order denying the relief then sought. Subsequent to such order, this Court, on September 30, 1958, set aside the aforementioned order and granted appellant's petition to proceed on the typewritten record and briefs.

Briefly summarized, the counts of which Brown was convicted upon the retrial, which conviction was affirmed as aforesaid, charged substantially the following:

Count Two charged that on March 4, 1953, appellant sold one ounce, 324 grains of heroin in violation of Title 21, U. S. C. A., Sec. 174.

Count Three charged that on March 13, 1953, appellant and Hollins sold one ounce, 440 grains of heroin in violation of Title 21, U. S. C. A., Sec. 174.

Count Four charged that on March 4, 1953, appellant received, concealed and facilitated the transportation of one ounce, 324 grains of heroin in violation of Title 21, U. S. C. A., Sec. 174.

Count Five charged that on March 13, 1953, appellant and Hollins received, concealed, and facilitated the transportation of one ounce, 440 grains of heroin in violation of Title 21, U. S. C. A., Sec. 174.

III.
THE STATUTE INVOLVED.

All of the aforementioned four counts were brought under one narcotic act, namely, 21 U. S. C., Section 174. This section was the statute as amended in 1951 and continued to be the statute that applied to the offenses charged, all of which occurred during the month of March, 1953. Title 21, U. S. C., Section 174, then provided as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or received, conceals, buys, sells, or in any manner facilitated the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years. Upon conviction for a

second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this subdivision, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subdivision or in section 2557(b)(1) of Title 26, or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the Act of December 17, 1914 (38 Stat. 789), as amended; sections 171, 173 and 174-177 of this title; section 12, chapter 553, of the Act of August 2, 1937 (50 Stat. 556), as amended; or sections 2557(b)(1) or 2596 of Title 26. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this subdivision.

"Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

IV.
QUESTIONS PRESENTED.

1. Whether consecutive sentences could properly be imposed on separate counts, one involving the sale of the heroin, the other involving the charge of receiving, concealing and facilitating the transportation of the same heroin? (In other words, Count Four pertains to the same heroin set forth in Count Two, and Count Five pertains to the same heroin set forth in Count Three.)

2. Whether or not the appellant, who concededly has not yet completed the service of two admitted valid sentences, may invoke jurisdiction to question consecutive sentences which he has not as yet commenced to serve?

V.
ARGUMENT.

The Consecutive Sentences Imposed Were All Valid.

It is to be observed that Section 174 of Title 21, U. S. C., provides that a second offender shall be imprisoned not less than five years nor more than ten years. Appellant Brown was concededly a second offender when herein sentenced. The same section provides for several violations. In other words, the sale of the narcotic, and the concealing or the facilitating the transportation are separate offenses despite the fact that they all grow out of the same transaction and occurred on the same date. This principle has been repeatedly sustained in sentences imposed under various of the narcotics statutes.

The most recent opinion of the Supreme Court in affirming the principles set forth in *Blockburger v. United States,* 284 U. S. 299, pertaining to sentences

under the narcotics statutes, among which reference was had to 21 U. S. C. Section 174, is that of *Gore v. United States,* 357 U. S. 386 (June 30, 1958). This case discussed the same contentions appellant here urges. The Court stated at page 389:

> "The fact that an offender violates by a single transaction several regulatory controls devised by Congress as means for dealing with a social evil as deleterious as it is difficult to combat does not make the several different regulatory controls single and identic."

The Court likewise said in the *Gore* opinion, page 388:

> "We adhere to the decision in *Blockburger v. United States, supra.* The considerations advanced in support of the vigorous attack against it have left its justification undisturbed, nor have our later decisions generated counter currents."

Appellant Brown urges several cases which do not concern themselves with narcotics in support of his contention that two of the imposed consecutive sentences should be vacated. These cases are *Bell v. United States,* 349 U. S. 81; *United States v. Universal C. I. T. Credit Corp.,* 344 U. S. 218, and *Prince v. United States,* 352 U. S. 322. In the *Gore* opinion all of the last three mentioned cases, had there likewise been urged. They are discussed and distinguished in the Supreme Court opinion; consequently, we shall not directly deal with them in this brief. It is our belief that the *Gore* opinion clearly distinguishes such cases.

The appellant, likewise, relies on additional cases not involving narcotic offenses. These we shall discuss at a later point.

It is understandable to the writer of this brief that a person may consider an injustice has been imposed upon him when he receives two sentences for what might normally appear to be one transaction. Such a transgressor may not appreciate the full import of Congress in trying to eliminate the nefarious narcotic traffic and may fail to realize that there are elements in one charge that are not present in another charge, although the same heroin is involved in both counts. This philosophy finds some support in the discussion contained in *Yancy v. United States*, 252 F. 2d 554 (C. A. 6, 1958), wherein such case a similar contention was urged but repudiated by the Sixth Circuit in, likewise, a narcotic offense, for, in quoting from Judge Bazelon's concurring opinion in *Gore v. United States,* 244 F. 2d at page 766, the Court noted as follows at page 556:

> "'If we were approaching afresh the question whether, in such a case, single or cumulative punishment is the legal course, I think we could not so easily conclude that the consecutive sentences here imposed are authorized. "It would be self-deceptive to claim that only one answer is possible to our problem. "* * * But the question is not one we are at liberty to approach afresh.'
>
> "As there suggested, it may be that the 'same evidence' test, applicable to narcotics offenses under the rule of the Blockburger case, will some day be re-examined by the Supreme Court in the light of its decisions applying the 'same transaction' test to other criminal statutes."

This problem has frequently been before this Court. One recent opinion of this Court, concerning the identical contention now urged, is *Logan v. United States,* 253 F. 2d 709 (C. A. 9, 1957), wherein two other opin-

ions of this Court are cited dealing with consecutive sentences which hold that the sale of heroin and its transportation constitute separate and distinct offenses.

The subject was again discussed and determined adversely to appellant's position in another narcotic case brought under 21 U. S. C., Section 174. In this Court's opinion of *Sherman v. United States,* 241 F. 2d 329 (C. A. 9, 1957), this Court stated on page 334:

> "It is true that each of the three offenses were part of a general plan but each had its separate genesis and separate train of events leading to culmination. Without further comment on the cases cited by appellant in support of his single transaction theory we point out that the law is well established, that even if there be any substance to the single transaction rule it does not apply in the federal courts.
>
> "The court in *Reynolds v. United States,* 6 Cir. 280 F. 1, 2, commented on the so-called 'single transaction' rule as follows:
>
> " 'The sole contention of plaintiff in error made here (although stated in two forms) is that she has been twice punished for a single offense, invoking in support of that contention divers holdings of state courts under what is called the "same transaction" rule. This broad rule * * * does not prevail in the courts of the United States, wherein it is well settled that it is competent for Congress to create separate and distinct offenses growing out of the same transaction.' "

It is thus observed that this Court has given consideration to the so-called "single transaction" theory.

Other cases adverse to appellant's position are legion. To cite but a few, attention is invited to the following:

United States v. Brisbane, 239 F. 2d 859 (C. A. 3, 1956), which also involves 21 U. S. C., Section 174; and

Martinez v. United States, 220 F. 2d 740 (C. A. 5, 1955), likewise involving a conviction under 21 U. S. C., Section 174.

To similar effect, with respect to a holding and discussion of convictions had under 21 U. S. C., Section 174, see:

United States v. Lewis, 227 F. 2d 524 (C. A. 2, 1955), *cert. den.* 350 U. S. 974.

The first offender is not necessarily a novice in the drug traffic. As pointed out by Judge McAllister in *Everett v. United States,* 227 F. 2d 457, 459 (C. A. 6, 1955).

> ". . . One who is convicted of a first offense for selling or dealings in narcotics is, often, an old hand at the game who has previously escaped arrest and conviction because he knows all the tricks. The purpose of the statute was not to give consideration to first offenders of the Narcotics law but to increase sentences for second and third offenders."

General Discussion.

The Boggs Act of 1951, applicable here (65 Stat. 767) alike other narcotic statutes is directed at increasing *minimum* sentences, not at mitigating any possible harsh results from multiple offenses.

The first section of the Act known as the Boggs Act (65 Stat. 767) separately amended Section 2(c) of the

Narcotic Drugs Import and Export Act. It made mandatory, for the first time, a *minimum* prison sentence of two years for the first offender, five years for the second offender, and ten years for the third offender, and also a fine of not to exceed $2,000 for all offenders. It set the maximum terms for first offenders at five years, for second offenders at ten years, and for third offenders at 20 years.

Section 2 of the Act *separately* amended Section 2557(b)(1) of the Internal Revenue Code, placing in that section the mandatory minimums and the scale of maximums above set forth.

The Boggs Act (65 Stat. 767) did not expressly refer to—much less overrule—the long-established *Blockburger* holding as to separate offenses. Its entire structure left all definitions and separations of offenses substantially as before. Indeed, the separate amendment of both the Import Act and the revenue code is in itself a significant, even if tacit, recognition of the separateness of the substantive offenses.

It is to be recalled that appellant is a second offender. (See copy of judgment sentencing the appellant dated April 19, 1954, as contained in Appendix.)

Amendments to the narcotics laws subsequent to the *Blockburger* decision have merely increased the penalties, and have not changed the character of the offenses proscribed. The fact that Congress prescribed a heavier sentence for subsequent offenders certainly does not show that it considered that the initial offense would be unitary, no matter how many statutes were violated. The character of the offenses as separate depends on *what* is proscribed; the increased penalty depends on *when* the offenses are committed, *i.e.,* whether they are committed

subsequent to a prior conviction or convictions. Even if the first conviction resulted from six clearly separate offenses—*e.g.*, six widely separated acts of sale—it would be a first conviction for recidivist penalty purposes. Hence, the provision for heavier penalties for subsequent violators—persons who had previously been punished or given an opportunity to reform—does not bear on the separate character of the offenses as such.

In arguing that, if the offenses are not separate as a matter of statutory construction, they must be held unitary to avoid violation of the constitutional prohibition against double jeopardy, appellant is admittedly asking this Court to reconsider a long line of its decisions to the effect that there is no violation of the double jeopardy clause if the offenses as such are different, no matter how closely related in actual fact.

Almost any criminal statute dealing with a particular field has an essentially "unitary" purpose, but that does not prevent separate offenses from being enacted by Congress. The prohibition statute involved in *Albrecht v. United States,* 273 U. S. 1 (an opinion by Justice Brandeis, holding possession and sale separate offenses) was aimed at preventing the sales of liquor except through recognized channels in a field in which Congress had complete authority regardless of any revenue foundation. The bribery statute involved in *Burton v. United States,* 202 U. S. 344 (involving agreement to take a bribe, and bribery) was aimed at preventing the taking of bribes. The counterfeit statute involved in *United States v. Michener,* 331 U. S. 789 (making a plate for counterfeiting, and possessing the plate), was aimed at preventing the circulation of counterfeit, another area in which Congress has full power over the field. As those decisions show, this does not mean that

Congress may or does impose only one punishment for all the various acts that can be done to defeat the single general Congressional purpose. Certainly, for example, Congress had the right to, and did, consider the making of counterfeit one evil, and the passing of counterfeit (whether by the maker or by someone else) a separate act and a separate evil punishable as a separate offense. The government is substantially and separately injured when each of its requirements directed toward enforcement of the desired end is violated. This is the situation here.

Appellant's entire argument, upon analysis, resolves itself into a contention that, on the particular facts of his case, the sentence is unfair. That is not, we submit, a basis for overturning long-established principles of statutory interpretation in the field of criminal law, or for construing anew the constitutional doctrine of double jeopardy.

Brief Discussion of Cases Cited by Appellant.

We have heretofore referred to the late Supreme Court *Gore* opinion wherein the Court specifically discussed and and distinguished several of the cases appellant relies upon. We shall now briefly refer to the other remaining cases that appellant has cited.

Appellant cites *Cosgrove v. United States,* 224 F. 2d 146 (C. A. 9, 1954). This case pertains to a charge of preparation and presentation of false tax returns. This is a case decided upon *res judicata.* The Court concluded that an acquittal on charges that the defendants had conspired to defraud the United States was *res judicata* to later charges of aiding and assisting in the preparation and presentation of such returns. This case is obviously not parallel to the instant charges.

Appellant also relies upon *Sealfon v. United States,* 332 U. S. 575 (1948). This opinion likewise deals with the doctrine of *res judicata.* The Court held that under the unique circumstances of the case an acquittal on charges to defraud the United States was *res judicata* of a later conviction for aiding and abetting the uttering and publishing of the same false invoices introduced at the conspiracy trial. The Supreme Court in *Sealfon* has, in practical effect, made the factual closeness of particular offenses a significant factor, not by upsetting long-established rules of double jeopardy (which indeed that decision reaffirmed), but by liberalized interpretation of the principle of *res judicata.*

Another case cited by appellant is *Yawn v. United States,* 244 F. 2d 235 (C. A. 5, 1957). This case holds that when the defendant was acquitted of a substantive count of the unlawful possession of a still, a conspiracy to violate Internal Revenue laws by unlawful possessing and controlling distilling apparatus and distilled spirits, and engaging in the business of a distiller without paying taxes, was barred, in that the doctrine of *res judicata* operates to conclude those matters in issue which the verdict determined although the offenses may be different, or, as said at page 237:

> ". . . This Court has phrased it, 'A question or issue determined by a prior acquittal may not be relitigated in a criminal proceeding against the same person.' "

The final case cited by appellant is *Simon v. United States,* 225 F. 2d 260 (C. A. 3, 1955), which likewise deals with a previous acquittal. It concerned itself with a prosecution for possession of stolen turkeys by a defendant who had been acquitted in a previous trial of a charge of receiving stolen turkeys. A relitigation of decided facts.

VI.
APPELLANT'S MOTION TO VACATE SENTENCES WAS PREMATURE.

At the offset we indicated that there was some question as to whether or not this Court had jurisdiction. This observation is had inasmuch as appellant apparently concedes that the sentences had on Counts Two and Three, the ones charging the *sale* of the heroin, are valid. If this be true, appellant has not concluded the service of such sentences and should not at this time invoke the relief provided for by Title 28, U. S. C., Section 2255.

A recent opinion of this Court dealing with this proposition is that of *Miller v. United States,* 256 F. 2d 501 (C. A. 9, 1958). This Court there held that relief under Section 2255 is limited to release from present detention and is not available to test the legality of threatened detention.

As we understand appellant's motion made to the District Court, no contention was there made that the sentences he is now serving are invalid.

The above principle seems to be that universally followed by this Circuit and by other authorities.

See also:

Williams v. United States, 236 F. 2d 894 (C. A. 9, 1956);

Toliver v. United States, 249 F. 2d 804 (C. A. 9, 1957);

United States v. Young, 93 Fed. Supp. 76 (W. D. Wash., N. D.—1950);

United States v. Greco, 141 Fed. Supp. 829 (U. S. D. C., M. D. Pa.—1956).

Conclusion.

It is therefore respectfully submitted that the relief sought by the appellant should be denied.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT JOHN JENSEN,
Assistant United States Attorney,
Chief, Criminal Division,

NORMAN W. NEUKOM,
Assistant United States Attorney,
Chief Trial Attorney,

Attorneys for Appellee.

APPENDIX.

United States District Court for the Southern District of California, Central Division.

United States of America v. James Boyd Brown. No. 22940-Cr. Indictment [5 Counts—for violation of 21 U. S. C. §174].

Judgment and Commitment.

On this 19th day of April, 1954 came the attorney for the government and the defendant appeared in person and with his attorney, Walter L. Gordon, Jr., Esquire.

It is adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offenses of having on or about March 4, 1953 and on or about March 13, 1953, in Los Angeles County, California, after importation, knowingly and unlawfully sold to Frank Stafford a certain narcotic drug, namely heroin, and of having knowingly and unlawfully received, concealed and facilitated the transportation and concealment, after importation, of a certain narcotic drug, namely heroin, all in violation of 21 U. S. C. § 174, as charged in Counts Two, Three, Four and Five of the indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court;

It is adjudged that the defendant is guilty as charged and convicted. And the United States Attorney having heretofore filed an information alleging a prior conviction of the defendant of an offense in violation of 21 U. S. C. § 174; and the defendant having admitted and affirmed in open court the commission by him of such prior offense

under 21 U. S. C. § 174 and his conviction therefor on October 21, 1949 in case No. 20857 in this court;

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten years for the second offense in violation of 21 U. S. C. § 174 charged in Count Two of the indictment, and shall pay to the United States of America a fine of $2,000; and shall be further imprisoned for a like term of ten years for the second offense in violation of 21 U. S. C. § 174 charged in Count THREE of the indictment, and shall pay to the United States of America a fine of $2,000; and shall be further imprisoned for a like term of ten years for the second offense in violation of 21 U. S. C. § 174 charged in Count FOUR of the indictment, and shall pay to the United States of America a fine of $2,000; and shall be further imprisoned for a like term of ten years for the second offense in violation of 21 U. S. C. § 174 charged in Count FIVE of the indictment, and shall pay to the United States of America a fine of $2,000;

IT IS FURTHER ADJUDGED that the four ten-year terms of imprisonment imposed for the offenses charged in Counts TWO, THREE, FOUR and FIVE of the indictment shall commence and run CONSECUTIVELY to each other, so that the defendant shall be committed to the custody of the Attorney General for imprisonment for a total period of forty years, and shall pay to the United States of America the fines totaling $8,000 herein imposed, and shall be further imprisoned until all said fines are paid or until he is otherwise discharged as provided by law;

IT IS FURTHER ADJUDGED that the defendant is hereby committed to the custody of the United States Marshal,

subject to any prior custody of the authorities of the State of California, to serve the four CONSECUTIVE ten-year sentences herein imposed.

IT IS FURTHER ADJUDGED that Count ONE of the indictment be and is hereby dismissed on motion of the United States Attorney.

IT IS FURTHER ADJUDGED that the bail of the defendant be exonerated.

IT IS FURTHER ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Filed April 19, 1954.

WM. C. MATHES
Wm. C. Mathes
United States District Judge

Edmund L. Smith, Clerk

By P. D. HOOSER
P. D. HOOSER, *Deputy Clerk*